

[PUBLIC LAW 413—80TH CONGRESS]

[CHAPTER 65—2D SESSION]

[H. R. 1366]

AN ACT

To facilitate procurement of supplies and services by the Departments of the Army, the Navy and the Air Force, the Coast Guard, and the National Advisory Committee for Aeronautics, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Armed Services Procurement Act of 1947."

SEC. 2. (a) The provisions of this Act shall be applicable to all purchases and contracts for supplies or services made by the Department of the Army, the Department of the Navy, the Department of the Air Force, the United States Coast Guard, and the National Advisory Committee for Aeronautics (each being hereinafter called the agency), for the use of any such agency or otherwise, and to be paid for from appropriated funds.

(b) It is the declared policy of the Congress that a fair proportion of the total purchases and contracts for supplies and services for the Government shall be placed with small business concerns. Whenever it is proposed to make a contract or purchase in excess of \$10,000 by negotiation and without advertising, pursuant to the authority of paragraph (7) or (8) of section 2 (c) of this Act, suitable advance publicity, as determined by the agency head with due regard to the type of supplies involved and other relevant considerations, shall be given for a period of at least fifteen days, wherever practicable, as determined by the agency head.

(c) All purchases and contracts for supplies and services shall be made by advertising, as provided in section 3, except that such purchases and contracts may be negotiated by the agency head without advertising if—

- (1) determined to be necessary in the public interest during the period of a national emergency declared by the President or by the Congress;
- (2) the public exigency will not admit of the delay incident to advertising;
- (3) the aggregate amount involved does not exceed \$1,000;
- (4) for personal or professional services;
- (5) for any service to be rendered by any university, college, or other educational institution;
- (6) the supplies or services are to be procured and used outside the limits of the United States and its possessions;
- (7) for medicines or medical supplies;
- (8) for supplies purchased for authorized resale;
- (9) for perishable subsistence supplies;
- (10) for supplies or services for which it is impracticable to secure competition;

(11) the agency head determines that the purchase or contract is for experimental, developmental, or research work, or for the manufacture or furnishing of supplies for experimentation, development, research, or test: *Provided*, That beginning six months after the effective date of this Act and at the end of each six-month period thereafter, there shall be furnished to the Congress a report setting forth the name of each contractor with whom a contract has been entered into pursuant to this subsection (11) since the date of the last such report, the amount of the contract, and, with due consideration given to the national security, a description of the work required to be performed thereunder;

(12) for supplies or services as to which the agency head determines that the character, ingredients, or components thereof are such that the purchase or contract should not be publicly disclosed;

(13) for equipment which the agency head determines to be technical equipment, and as to which he determines that the procurement thereof without advertising is necessary in order to assure standardization of equipment and interchangeability of parts and that such standardization and interchangeability is necessary in the public interest;

(14) for supplies of a technical or specialized nature requiring a substantial initial investment or an extended period of preparation for manufacture, as determined by the agency head, when he determines that advertising and competitive bidding may require duplication of investment or preparation already made, or will unduly delay procurement of such supplies;

(15) for supplies or services as to which the agency head determines that the bid prices after advertising therefor are not reasonable or have not been independently arrived at in open competition: *Provided*, That no negotiated purchase or contract may be entered into under this paragraph after the rejection of all bids received unless (A) notification of the intention to negotiate and reasonable opportunity to negotiate shall have been given by the agency head to each responsible bidder, (B) the negotiated price is lower than the lowest rejected bid price of a responsible bidder, as determined by the agency head, and (C) such negotiated price is the lowest negotiated price offered by any responsible supplier;

(16) the agency head determines that it is in the interest of the national defense that any plant, mine, or facility or any producer, manufacturer, or other supplier be made or kept available for furnishing supplies or services in the event of a national emergency, or that the interest either of industrial mobilization in case of such an emergency, or of the national defense in maintaining active engineering, research and development, are otherwise subserved: *Provided*, That beginning six months after the effective date of this Act and at the end of each six-month period thereafter, there shall be furnished to the Congress a report setting forth the name of each contractor with whom a contract has been entered into pursuant to this subsection (16) since the date of the last such report, the amount of the contract, and, with

due consideration given to the national security, a description of the work required to be performed thereunder; or

(17) otherwise authorized by law.

(d) If in the opinion of the agency head bids received after advertising evidence any violation of the antitrust laws he shall refer such bids to the Attorney General for appropriate action.

(e) This section shall not be construed to (A) authorize the erection, repair, or furnishing of any public building or public improvement, but such authorization shall be required in the same manner as heretofore, or (B) permit any contract for the construction or repair of buildings, roads, sidewalks, sewers, mains, or similar items to be negotiated without advertising as required by section 3, unless such contract is to be performed outside the continental United States or unless negotiation of such contract is authorized by the provisions of paragraph (1), (2), (3), (10), (11), (12), or (15) of subsection (c) of this section.

SEC. 3. Whenever advertising is required—

(a) The advertisement for bids shall be a sufficient time previous to the purchase or contract, and specifications and invitations for bids shall permit such full and free competition as is consistent with the procurement of types of supplies and services necessary to meet the requirements of the agency concerned.

(b) All bids shall be publicly opened at the time and place stated in the advertisement. Award shall be made with reasonable promptness by written notice to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered: *Provided*, That all bids may be rejected when the agency head determines that it is in the public interest so to do.

SEC. 4. (a) Except as provided in subsection (b) of this section, contracts negotiated pursuant to section 2 (c) may be of any type which in the opinion of the agency head will promote the best interests of the Government. Every contract negotiated pursuant to section 2 (c) shall contain a suitable warranty, as determined by the agency head, by the contractor that no person or selling agency has been employed or retained to solicit or secure such contract upon an agreement or understanding for a commission, percentage, brokerage or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business, for the breach or violation of which warranty the Government shall have the right to annul such contract without liability or in its discretion to deduct from the contract price or consideration the full amount of such commission, percentage, brokerage, or contingent fee.

(b) The cost-plus-a-percentage-of-cost system of contracting shall not be used, and in the case of a cost-plus-a-fixed-fee contract the fee shall not exceed 10 per centum of the estimated cost of the contract, exclusive of the fee, as determined by the agency head at the time of entering into such contract (except that a fee not in excess of 15 per centum of such estimated cost is authorized in any such contract for experimental, developmental, or research work and that a fee inclusive of the contractor's costs and not in excess of 6 per centum of the estimated cost, exclusive of fees, as determined by the agency head

at the time of entering into the contract, of the project to which such fee is applicable is authorized in contracts for architectural or engineering services relating to any public works or utility project). Neither a cost nor a cost-plus-a-fixed-fee contract nor an incentive-type contract shall be used unless the agency head determines that such method of contracting is likely to be less costly than other methods or that it is impractical to secure supplies or services of the kind or quality required without the use of a cost or cost-plus-a-fixed-fee contract or an incentive-type contract. All cost and cost-plus-a-fixed-fee contracts shall provide for advance notification by the contractor to the procuring agency of any subcontract thereunder on a cost-plus-a-fixed-fee basis and of any fixed-price subcontract or purchase order which exceeds in dollar amount either \$25,000 or 5 per centum of the total estimated cost of the prime contract; and a procuring agency, through any authorized representative thereof, shall have the right to inspect the plants and to audit the books and records of any prime contractor or subcontractor engaged in the performance of a cost or cost-plus-a-fixed-fee contract.

SEC. 5. (a) The agency head may make advance payments under negotiated contracts heretofore or hereafter executed in any amount not exceeding the contract price upon such terms as the parties shall agree: *Provided*, That advance payments shall be made only upon adequate security and if the agency head determines that provision for such advance payments is in the public interest or in the interest of the national defense and is necessary and appropriate in order to procure required supplies or services under the contract.

(b) The terms governing advance payments may include as security provision for, and upon inclusion of such provision there shall thereby be created, a lien in favor of the Government, paramount to all other liens, upon the supplies contracted for, upon the credit balance in any special account in which such payments may be deposited and upon such of the material and other property acquired for performance of the contract as the parties shall agree.

SEC. 6. Whenever any contract made on behalf of the Government by the agency head or by officers authorized by him so to do includes a provision for liquidated damages for delay, the Comptroller General on the recommendation of the agency head is authorized and empowered to remit the whole or any part of such damages as in his discretion may be just and equitable.

SEC. 7. (a) The determinations and decisions provided in this Act to be made by the agency head may be made with respect to individual purchases and contracts or with respect to classes of purchases or contracts, and shall be final. Except as provided in subsection (b) of this section, the agency head is authorized to delegate his powers provided by this Act, including the making of such determinations and decisions, in his discretion and subject to his direction, to any other officer or officers or officials of the agency.

(b) The power of the agency head to make the determinations or decisions specified in paragraphs (12), (13), (14), (15), and (16) of section 2 (c) and in section 5 (a) shall not be delegable, and the power to make the determinations or decisions specified in paragraph (11) of section 2 (c) shall be delegable only to a chief officer responsible for

procurement and only with respect to contracts which will not require the expenditure of more than \$25,000.

(c) Each determination or decision required by paragraphs (11), (12), (13), (14), (15), or (16) of section 2 (c), by section 4 or by section 5 (a) shall be based upon written findings made by the official making such determination, which findings shall be final and shall be available within the agency for a period of at least six years following the date of the determination. A copy of the findings shall be submitted to the General Accounting Office with the contract.

(d) In any case where any purchase or contract is negotiated pursuant to the provisions of section 2 (c), except in a case covered by paragraphs (2), (3), (4), (5) or (6) thereof, the data with respect to the negotiation shall be preserved in the files of the agency for a period of six years following final payment on such contract.

SEC. 8. No purchase or contract shall be exempt from the Act of June 30, 1936, as amended (49 Stat. 2036, as amended by the Act of June 28, 1940, 54 Stat. 681, and by the Act of May 13, 1942, 56 Stat. 277; U. S. C., title 41, secs. 35 to 45) or from the Act of March 3, 1931, as amended (46 Stat. 1494, as amended by the Act of August 30, 1935, 49 Stat. 1011, and by the Act of June 15, 1940, 54 Stat. 399; U. S. C., title 40, secs. 276a to 276a-6), solely by reason of having been entered into pursuant to section 2 (c) hereof without advertising, and the provisions of said Acts and of the Act of June 19, 1912, as amended (37 Stat. 137, as amended by the Act of September 9, 1940, 54 Stat. 884; U. S. C., title 40, secs. 324 and 325a), if otherwise applicable, shall apply to such purchases and contracts.

SEC. 9. As used herein—

(a) The term "agency head" shall mean the Secretary, Under Secretary (if any), or any Assistant Secretary of the Army, of the Navy, or of the Air Force; the Commandant, United States Coast Guard, Treasury Department; and the Executive Secretary, National Advisory Committee for Aeronautics, respectively.

(b) The term "supplies" shall mean all property except land, and shall include, by way of description and without limitation, public works, buildings, facilities, ships, floating equipment, and vessels of every character, type and description, aircraft, parts, accessories, equipment, machine tools and alteration or installation thereof.

SEC. 10. In order to facilitate the procurement of supplies and services by each agency for others and the joint procurement of supplies and services required by such agencies, subject to the limitations contained in section 7 of this Act, each agency head may make such assignments and delegations of procurement responsibilities within his agency as he may deem necessary or desirable, and the agency heads or any of them by mutual agreement may make such assignments and delegations of procurement responsibilities from one agency to any other or to officers or civilian employees of any such agency, and may create such joint or combined offices to exercise such procurement responsibilities, as they may deem necessary or desirable. Appropriations available to any such agency shall be available for obligation for procurement as provided for in such appropriations by any other agency through administrative allotments in such amount as may be authorized by the head of the allotting agency without transfer of funds on the books of the Treasury Department. Disbursing officers

of the allotting agency may make disbursements chargeable to such allotments upon vouchers certified by officers or civilian employees of the procuring agency.

SEC. 11. (a) The following Acts are hereby repealed:

- Revised Statutes, section 3716 (U. S. C., title 10, sec. 1202);
- Revised Statutes, section 3717 (U. S. C., title 41, sec. 9);
- Revised Statutes, section 3718 (U. S. C., title 34, sec. 561);
- Revised Statutes, section 3719 (U. S. C., title 34, sec. 562);
- Revised Statutes, section 3720 (U. S. C., title 34, sec. 563);
- Revised Statutes, section 3721, as amended (U. S. C., title 34, secs. 569-570);
- Revised Statutes, section 3722 (U. S. C., title 34, sec. 572);
- Revised Statutes, section 3723 (U. S. C., title 34, sec. 573);
- Revised Statutes, section 3724 (U. S. C., title 34, sec. 574);
- Revised Statutes, section 3726 (U. S. C., title 34, sec. 577);
- Revised Statutes, section 3727 (U. S. C., title 34, sec. 578);
- Revised Statutes, section 3729 (U. S. C., title 34, sec. 579);
- Act of June 14, 1873, Numbered 30 (20 Stat. 253; U. S. C., title 34, sec. 565);
- Act of March 3, 1893 (ch. 212, sec. 1, 27 Stat. 732; U. S. C., title 34, sec. 566);
- Act of March 2, 1907 (ch. 2512, 34 Stat. 1193; U. S. C., title 34, sec. 571);
- Act of March 4, 1913 (ch. 148, 37 Stat. 904; U. S. C., title 34, sec. 575);
- Act of June 30, 1914 (ch. 130, 38 Stat. 398; U. S. C., title 34, sec. 567);
- Act of May 15, 1936 (ch. 400, 49 Stat. 1277; U. S. C., title 10, sec. 1199 (a));
- Act of July 13, 1939 (ch. 265, 53 Stat. 1000; U. S. C., title 10, sec. 313).

(b) The following Acts shall not apply to the procurement of supplies or services by the Department of the Army, the Department of the Navy, the Department of the Air Force, the United States Coast Guard, Treasury Department, or the National Advisory Committee for Aeronautics:

- Revised Statutes, section 3709, as amended (U. S. C., title 41, sec. 5);
- Revised Statutes, section 3735 (U. S. C., title 41, sec. 13);
- Act of October 10, 1940, ch. 851, sec. 1, 54 Stat. 1109, as amended (U. S. C., title 41, secs. 6 and 6a).

(c) The following parts of Acts are hereby repealed:

(1) That portion of the Act making appropriations for fortifications, approved February 24, 1891 (26 Stat. 769), relating to "Armament of fortifications", which reads as follows: "*Provided*, That no contract for the expenditure of any portion of the money herein provided, or that may be hereafter provided, for the purchase of steel shall be made until the same shall have been submitted to public competition by the Department by advertisement."

(2) Those portions of the Army Appropriation Acts approved March 2, 1901 (ch. 803, 31 Stat. 905; U. S. C., title 10, sec. 1201); and June 30, 1902 (32 Stat. 514), relating to "Quartermaster's Department, Regular Supplies", which read as follows: "*Provided further*, That hereafter, except in cases of emergency or where it is impracticable

to secure competition, the purchase of all supplies for the use of the various departments and posts of the Army and of the branches of the Army service shall only be made after advertisement, and shall be purchased where the same can be purchased the cheapest, quality and cost of transportation and the interests of the Government considered."

(3) That portion of the Army Appropriation Act approved June 12, 1906 (ch. 3078, 34 Stat. 258; U. S. C., title 10, sec. 1205), relating to "Ordnance Department", which reads as follows: "Hereafter the purchase of supplies and the procurement of services for all branches of the Army service may be made in open market, in the manner common among businessmen, when the aggregate of the amount required does not exceed five hundred dollars; but every such purchase exceeding one hundred dollars shall be promptly reported to the Secretary of War for approval, under such regulations as he may prescribe."

(4) That portion of the Army Appropriation Act, approved May 11, 1908 (ch. 163, 35 Stat. 125; U. S. C., title 10, sec. 1199), relating to "Ordnance Department", which reads as follows: "Whenever proposals are invited for the furnishing of articles of ordnance property, the character of which or the ingredients thereof are of such a nature that the interests of the public service would be injured by publicly divulging them, the Chief of Ordnance is authorized to purchase such articles in such manner as he may deem most economical and efficient."

(5) That portion of the War Department Appropriation Act, approved May 15, 1936 (49 Stat. 1299), relating to "Arms, uniforms, equipment, and so forth, for field service, National Guard", which reads as follows: "*Provided*, That specifications for motor vehicles, which shall be so drawn as to admit of competition, shall to the extent otherwise practicable conform with the requirements of the National Guard."

(d) All other laws and parts of laws to the extent that they are inconsistent with this Act are hereby repealed.

SEC. 12. The Secretary of the Navy shall have the same authority with respect to contracts of the Department of the Navy as the Secretary of the Army has with respect to contracts of the Department of the Army under the Act of April 10, 1878, as amended (20 Stat. 36, as amended by the Act of March 3, 1883, 22 Stat. 487; U. S. C., title 5, sec. 218). The Secretary of the Army and the Secretary of the Air Force shall have the same authority with respect to emergency purchases of war material abroad as the Secretary of the Navy has with respect to such purchases under the Act of June 30, 1914 (38 Stat. 399; U. S. C., title 34, sec. 568).

SEC. 13. This Act shall become effective ninety days after the date of enactment.

Approved February 19, 1948.